TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 738

THE UNITED STATES OF AMERICA, PETITIONER

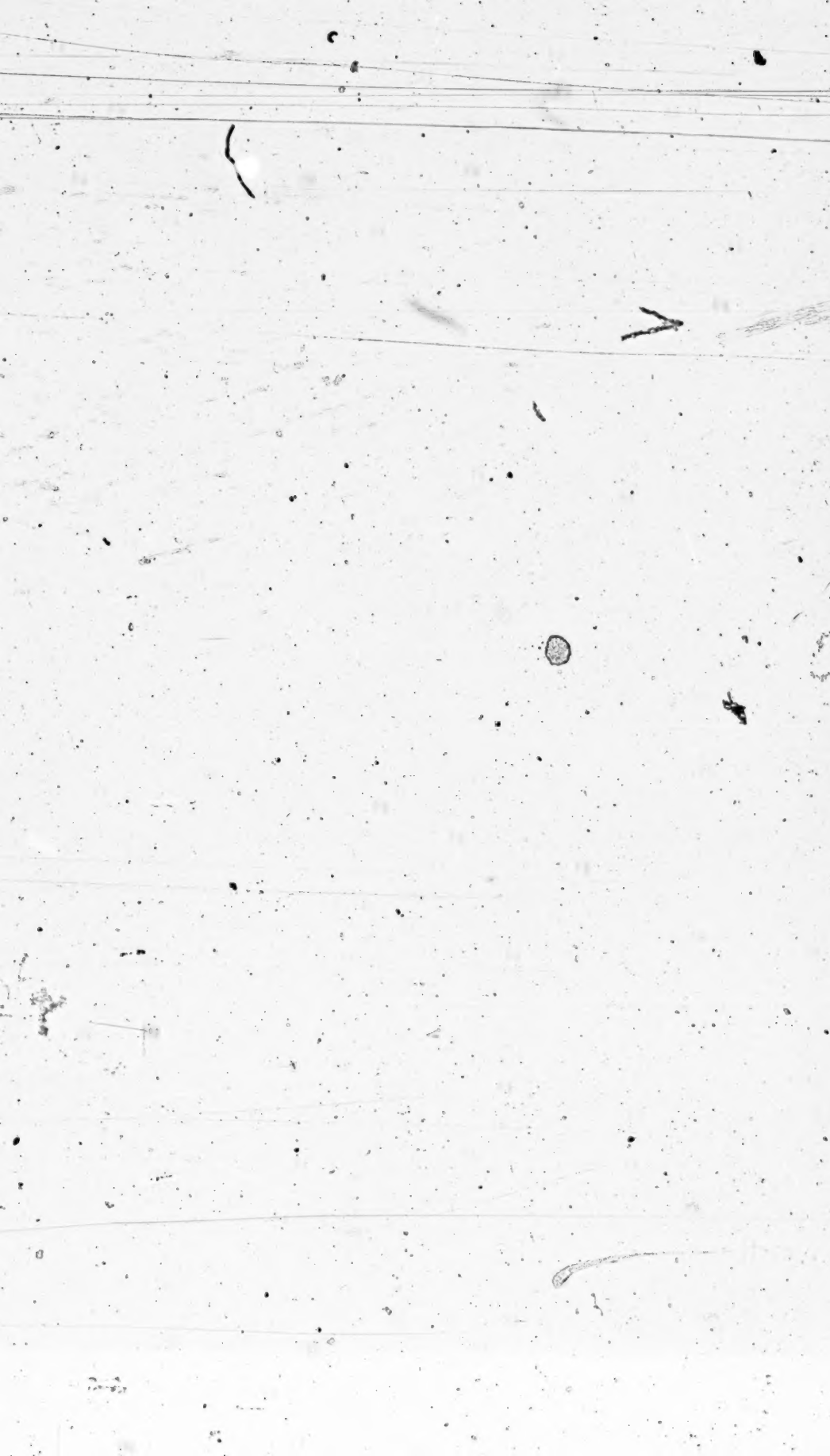
Citizens Loan & Trust Co. Adm'r de bonis non

vs.

~~ELIZABETH KERR, ADMINISTRATRIX~~ OF THE ESTATE OF JOSEPH KELLY KERR, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED NOVEMBER 10, 1941
CERTIORARI GRANTED DECEMBER 15, 1941



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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THE UNITED STATES OF AMERICA, PETITIONER

vs.

ELIZABETH KERR, ADMINISTRATRIX OF THE ESTATE OF JOSEPH KELLY KERR, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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A [Caption omitted.]

1 In District Court of the United States for the District of Columbia

Law No. 70830

ELIZABETH KERR, AS ADMINISTRATRIX OF THE ESTATE OF JOSEPH KELLY KERR, DECEASED, PLAINTIFF,

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Agreed statement of case on appeal

Filed March 4, 1941

Believing the questions presented upon this appeal can be determined without an examination of all the pleadings, evidence and proceedings below, the parties hereto respectfully submit this agreed statement of the case as setting forth so many of the facts as are essential to a decision of the questions by this Honorable Court, to wit:

The questions involved on the appeal arise in connection with proceedings below pursuant to the decision of this Court on December 4, 1939, of a prior appeal designated as No. 7391, Kerr v. United States in this Court, and the remand of the case for further consistent proceedings.

It is agreed this Court, in its decision reversing the judgment of the lower Court to the contrary, held the defendant United States liable on November 8, 1919, the date of death of insured, for the proceeds of a certain yearly renewable term insurance policy contract in the principal amount of $10,000 upon the life of Joseph Kelly Kerr, although the grace month premium for November 1919, remained unpaid at his death.

2 It is agreed that Eugene Kerr, father of insured and designated beneficiary of the policy contract, survived insured and died subsequently on June 24, 1924, before receiving any part of its proceeds by any award thereof or otherwise. By intervening petition filed below on April 4, 1940, Elizabeth Kerr, Admx. of the Estate of Eugene Kerr, deceased beneficiary, was made a party plaintiff.

It is agreed the proceedings pertinent to the questions involved on this appeal are as follows:

[Captions omitted.]

Judgment pursuant to mandate

Rendered April 4, entered April 5, 1940

The plaintiff, Elizabeth Kerr, Administratrix of the Estate of Joseph Kelly Kerr, deceased, having appealed to the United States Circuit Court of Appeals for the District of Columbia from the judgment of this Court entered herein on March 27, 1939, and after hearing thereof, said Court of Appeals having issued its mandate, duly filed herein, with direction that said judgment of this Court be reversed, and for further necessary proceedings, and it appearing Elizabeth Kerr, Administratrix of the Estate of Eugene Kerr, deceased, is an additional party plaintiff herein entitled to recover by and for cause shown in her amended complaint duly filed by leave of Court, and the Court having heretofore made and filed its findings of fact herein, and the Court being advised, it is this 4th day of April 1940:

Ordered that the judgment of the United States Circuit Court of Appeals for the District of Columbia as set forth in its mandate heretofore filed in this Court on December 22, 1939, be and the same is made the judgment of this Court, and that the judgment of this Court entered herein on March 27, 1939, be and same is reversed, and it is further

3 Ordered, adjudged and decreed, That the plaintiff, Elizabeth Kerr, Administratrix of the Estate of Eugene Kerr, deceased do have and recover from the defendant, The United States of America, the sum of $3,220, representing monthly installments of insurance that have accrued on or since November 8, 1919, to and inclusive of June 8, 1924, in the month of the death of Eugene Kerr, and that Elizabeth Kerr, Administratrix of the Estate of Joseph Kelly Kerr, deceased, do have and recover from the defendant The United States of America, the sum of $10,580, representing monthly installments of insurance that have accrued on or since July 8, 1924, to and inclusive of October 8, 1939, making the aggregate amount of this judgment to be $13,800, and it is

Further ordered and adjudged that 10% of each of said recoveries, to wit, a total of $1,380.00 be payable to and paid to Camden R. McAtee, attorney of record for said plaintiffs as the

attorney fees allowable by law for services herein to said plaintiffs, and in reduction of the amounts payable to said plaintiffs.

(S) F. DICKINSON LETTS, *Justice.*

Approved as to form.

(S) ALLEN CRENSHAW,
Atty. Dept. of Jus.

4 *Motion for Correction and Substitution of Judgment in Favor of Plaintiff*

Filed June 21, 1940

Comes the defendant, the United States of America, by the United States Attorney in and for the District of Columbia, and moves the Court that the judgment in favor of the plaintiffs heretofore entered by this Court on April 4, 1940, be corrected, amended, changed, and altered to provide only for the payment of installments of insurance at the rate of $57.50 each per month, beginning on November 8, 1919, date of death of the insured, Joseph Kelly Kerr, to and including June 8, 1924, the monthly installment due and payable immediately prior to date of death of Eugene Kerr, the designated beneficiary on June 24, 1924, such installments payable to the administratrix of the estate of said Eugene Kerr, and that the remaining unpaid monthly installments of such insurance accruing after June 8, 1924, be recovered and payable to the administratrix of the estate of said Joseph Kelly Kerr, deceased insured, in the commuted value of such unpaid monthly installments as of the date of July 8, 1924, in the sum of $8,234, instead of the recovery as provided in the judgment heretofore entered of the monthly installments of $57.50 each beginning from and after July 8, 1924, and inclusive of October 8, 1939, in the total number of 184 installments, and assigns as grounds for such motion, as follows:

I

The judgment heretofore entered on April 4, 1940, in providing for the payment of monthly installments following the death of the designated beneficiary on June 24, 1924, to and including October 8, 1939, in the total sum of $10,580 is incorrect, unauthorized by law and is an illegal charge against this defendant under
5 the provisions of Section 303 of the World War Veterans Act as amended March 4, 1925, which provides for the payment of such insurance benefits after the death of the designated bene-

ficiary to the estate of the deceased insured, the then present value of the remaining unpaid monthly installments, which here amount to the sum of $8,234, less $6.50 premium due on the insurance for the month of November 1919, payable November 1, 1919, prior to the death of the insured on November 8, 1919, instead of the amount, provided for in the judgment entered, of monthly installments, totalling 184, or a total sum of $10,580.

II

The judgment heretofore entered on April 4, 1940, erroneously provided for the recovery of these installments rather than the commuted value thereof because of the inadvertence and mistake of this attorney representing the defendant in failing at the time of the entering of the judgment to recall this very plain provision of law and applying the same to the judgment being entered and for which he offers his humble apologies.

Respectfully submitted,

(S) ALLEN CRENSHAW,
Attorney, Department of Justice.

6 *Stipulation and Affidavits Relating to Motion*

Filed January 9, 1941, nunc pro tunc as of June 21, 1940

Stipulation

[Signatures omitted.]

The parties herein stipulate the Court may find the following as matters of fact herein:

1. After death of Eugene Kerr, beneficiary, on June 24, 1924, that 184 installments of $57.50 were thereafter payable under the insurance contract herein monthly therein from July 1924, through October 1939, both inclusive.

2. That the commuted present value of said 184 monthly installments thereafter payable, calculated with interest at 3½%, as of July 8, 1924, and thereby as of June 24, 1924, was and is $8,234.00.

3. That the present value of said 184 installments on October 8, 1939, and thereafter was and is $10,580.00.

7 *Affidavit of Allen Crenshaw*

[Jurat omitted.]

I, the undersigned, Allen Crenshaw, formerly an attorney in the Department of Justice, hereby certify to the facts known to me in connection with the entering of judgment for plaintiff by the United States District Court in and for the District of Columbia in the suit of Elizabeth Kerr, Administratrix of the Estate of

Joseph Kelly Kerr, deceased, and Elizabeth Kerr, Administratrix of the Estate of Eugene Kerr, deceased beneficiary v. United States of America on the 4th day of April 1940, as follows:

For some two years I personally handled this case in its preparation for trial, in its presentation to the Court, in the preliminary discussions before entering of the judgment and in approving such judgment. At all times, even years before I had any connection with this case, I was fully aware and recognized the practice, procedure, and interpretation of the law by the Veterans Administration and by the Bureau of War Risk Litigation, in which interpretation I concurred, which limited the payment of installments of insurance benefits following the death of the insured and the death of the designated beneficiary to the commuted value of such installments, calculated as of the date of death of the designated beneficiary, rather than the full installments as they may have otherwise matured. This was regardless of the date of any judgment or award of recovery of such insurance. As a matter of fact, I had previously prepared judgments for plaintiffs in a very large number of cases in which recovery on a basis of the commuted value rather than the full installment had been provided for. In a great many, if not a vast majority of the cases, it had been the practice of my office to prepare judgments for plaintiffs since I found this method would best concentrate my thought upon the terms of the judgment to be entered and avoid errors therein. The fact that the judgment as entered
8 herein provided for the recovery of the full installments instead of the commuted value thereof calculated as of the date of the death of the designated beneficiary was occasioned solely because it escaped my notice. This error in failing to call this to the Court's attention and to object to the inclusion of that provision in the judgment as entered was clearly, definitely, and certainly an error on my part, occasioned by an oversight which, under the circumstances I think is understandable and excusable. The circumstances are as follows:

The attitude of the attorney for the plaintiff during the whole course of the progress of this trial was one of suspicion, antagonism, and insistence upon an infinite detail, that frequently resulted in the most heated discussions and arguments until long before the question of entering this judgment arose, I had accumulated an exaggerated desire to avoid any conflicting opinions with him. In other words, I sought on every occasion, when it became necessary to consider any feature of the case, to waive insignificant or immaterial or petty detail that I might avoid the tedium and unpleasant arguments I anticipated.

After the decision of the Court of Appeals, requiring apparently a judgment for plaintiff, the plaintiff's attorney came to my office

and we had a general discussion on the subject of the proposed judgment. Following my usual custom, I suggested without undue insistence, that my office would prepare the judgment and submit to him. He seemed to object to this and insisted that he would prepare his own judgment as was his right and privilege. At that time no details of the provisions of such a judgment entered into the discussion. If any mention was made, which may be possible, of the size of the judgment or the attorney's fee involved, it was general in nature and done with the common use of generalities rather than specific terms under such conditions. Some time later, this attorney presented to me at my office the proposed judgment which he had prepared. Upon hastily reading the same, I
9 discovered the more obvious errors that it provided for the recovery of interest and attorney's fees in addition to the principal sums of the judgment. This provision in his proposed judgment indicates the certainty that we had not previously discussed the specific terms of the judgment. I immediately called these errors to his attention but he did not concede them until we had had a lengthy argument and discussion of the Courts' decisions, which were examined over a period of several hours. The exhaustive character of this discussion undoubtedly diverted my attention from other details of the judgment and caused me to overlook the less obvious error involved in the recovery of full installments rather than the commuted value thereof. In addition, the question of the death of the beneficiary and the joining of the administrator of that estate, which was the determining factor as to the method and amount of the payment of installments accruing after that death was not a part of the suit herein until the time had arrived for entering the judgment, when plaintiff's attorney filed the necessary petition to join such administrator. Up to that point, and due to the circumstances above narrated, I perhaps had hazily figured that the payment would involve the full amount of installments without taking into consideration the effect of the death of the beneficiary which entered into the case at such a late hour. I am sure that had I drawn and prepared the judgment or had I taken any notice of the situation created by the death of the beneficiary, that I would not have approved the judgment containing provisions for the recovery of full installments, but would have insisted upon eliminating that and substituting recovery of the commuted value as of the date of the death of such beneficiary.

I can account for my oversight and the error in not objecting to this provision prior to the entering of this judgment in no other way. That the error was occasioned by my oversight as stated above, is definite and certain in my own mind. After the experi-

ence of a number of years in which I had occasion to prepare and approve many hundreds of judgments, I do not recall another instance in which I made such a mistake as this. I also definitely state that of the many judgments entered and frequently prepared by me for plaintiffs' attorneys, all of which provided for recovery of the commuted rather than full installments in such similar instances as here, that no other attorney has ever questioned or objected to that well recognized practice, procedure, and interpretation of the law.

(S) ALLEN CRENSHAW.

10 *Counter-Affidavit of Camden R. McAtee*

Filed January 9, 1941 (n. p. t. supra.)

[Jurat omitted.]

Camden R. McAtee, being duly sworn, states:

For counter-affidavit to that of Hon. Allen Crenshaw herein, and with deference to and for correction of the frailties of memories therein revealed:

That affiant did informally submit and discuss at intervals drafts of judgments herein relative to the recovery by the estate of the insured as follows (in substance from copies in his files):

(a) For recovery of $10,599.17; being the installments of $57.50 payable for the interval months between June 24, 1924 and November 8, 1939, subject to 10% attorney allowance.

(b) For recovery of $57.50 for the interval months from June 8, 1924 to November 8, 1939, subject to 10% attorney allowance.

That no judgment submitted provided for recovery of any interest upon the installments, and each provided for recovery in full and without commutation, of installments payable after death of the beneficiary in June 1924.

That Col. Crenshaw suggested the installment for June 1924 was allocable to the beneficiary recovery as presumably payable on the anniversary date of insured's death, and the awarded recovery to the estate of the insured in the judgment entered April 5, 1940, was stated in the amount of $10,580, and to the beneficiary estate in the amount of $3,220, each subject to 10% attorney allowance.

That in said discussions the unusual facts herein that the 240 installments had all accrued in October 1939 under the insurance contract, were all unpaid, and being judicially awarded, were fully known and recognized as well as the statutory provision that
11 the installments payable after death of the beneficiary to the estate of insured were subject to commutation as of the date of last payment under any existing award, whereby, as the result

of the judicial award made by a judgment award to the beneficiary estate after October 1939, the installments thereafter payable to the estate of insured would not be commutable because previously entirely accrued and that the award of judgment to the estate of insured was consequently the total of said installments payable after death of the beneficiary as so entirely accrued before and at the time of the award of judgment to the beneficiary estate.

That, prior to entry of said judgment awards, affiant was not informed by Col. Crenshaw, or otherwise of the new alleged practice, procedure, and interpretation of the law by the Veterans' Administration and Bureau of War Risk Litigation as limiting installment payment after deaths of insured and surviving beneficiary to the commuted value thereof as of the date of death of the beneficiary regardless of the date of any judgment or award of recovery, and denies either the existence or validity thereof. For cause in support of said denial, affiant says administrative application of the statutory provision is to the contrary (V. A. Cody ruling; 5 C. G. 501). That, after statutory disagreement and institution of action thereon that the determination of the rights of the beneficiary estate and estate of insured to the proceeds and award thereof for recovery is judicial, not administrative, and the judgment of award for recovery by the beneficiary estate is determinative of the nature of the judgment of award for recovery by the estate of insured, and under the facts of this case, after a judgment award to the beneficiary estate of all installments thereto payable, the statute justifies and requires judgment award to the estate of insured in full and without commutation, of all remaining installments accruable and accrued previous to either judgment award under the insurance contract.

Affiant further states, after entry, the judgment recoveries herein were reviewed and certified as correct to the Bureau of War
12 Risk Litigation, and there reviewed and certified again as correct to the Veterans' Administration for payment.

Affiant disclaims any intention to harass or annoy Col. Crenshaw as stated by him herein and always endeavored to match his unfailing courtesy and to relieve him of detail in preparation of the case because of the evident press of other work upon him, and regrets the Department of Justice is without his earnest, capable, and deserving services.

Affiant, by reason of the premises, denies mistake, surprise, inadvertence or excusable neglect, justifying correction of the judgment award herein to the estate of insured, has been shown.

(S) CAMDEN R. MCATEE.

13 *Plaintiffs' motion for award of interest*

Filed December 27, 1940

Come plaintiffs Elizabeth Kerr, Administratrix of the Estate of Eugene Kerr, deceased, judgment-creditor herein in the amount of $3,220, and Elizabeth Kerr, Administratrix of the Estate of Joseph Kelly Kerr, deceased, judgment-creditor herein in the amount of $10,580, under judgment entered on April 4, 1940, and thereafter in full force and effect, by their attorney, and moves the Court:

To enter its order or orders awarding said plaintiffs interest at the rate of 6% per annum from June 21, 1940, until paid upon the principal sums of said recoveries less any sums hereinafter finally determined to be proper set-off, reduction of recovery, or other offset to said judgment-recoveries in favor of the United States.

For cause: (a) That by motions for correction and stay filed on June —, 1940, and thereafter, the defendant, United States, has withheld and is withholding the entire judgment recoveries pending determination herein of alleged minor set-off and correction of one of said judgment recoveries.

(b) In such case plaintiffs are entitled to said interest upon the amounts withheld for the time withheld to the extent same are finally payable.

(s) CAMDEN R. MCATEE.
Attorney for Plaintiffs.

* * * * *

Points and authorities

Act of March 3, 1933, c. 212, Title II, 47 St. 1516.

14 *Reference to Veteran Commissioner*

November 18, 1940

Honorable William R. Harr,
1644 Department of Justice Building,
Washington, D. C.

MY DEAR COMMISSIONER: I present for your consideration defendant's motion to correct judgment in Kerr vs. United States, law number 70830.

At the oral argument counsel for plaintiff requested that findings of fact accompany the ruling. I have endeavored to obtain

an agreement of counsel as to the essential facts but this without avail. With the papers which I enclose I include the suggested findings and the briefs which supplement the oral hearing.

Will you be good enough to assist me in my consideration of this motion, giving it your usual careful attention? It may be needless to say that much earnestness is evinced by both sides.

Will you also indicate what findings, if any, are necessary and appropriate to my ruling?

Sincerely yours,

F. DICKINSON LETTS.

FDL:GH.
Encl.

15 *Report of Veteran Commissioner*

Filed December 31, 1940

REPORT OF COMMISSIONER UPON DEFENDANT'S MOTION FOR CORRECTION OF JUDGMENT

On April 4, 1940, this court rendered judgment in this case pursuant to the mandate of the Court of Appeals reversing the judgment rendered by this court March 27, 1939. By said judgment (entered April 5, 1940) it was

Ordered, adjudged, and decreed, That the plaintiff, Elizabeth Kerr, Administratrix of the Estate of Eugene Kerr, deceased do have and recover from the defendant, The United States of America, the sum of $3,220, representing monthly installments of insurance that have accrued on or since November 8, 1919, to and inclusive of June 8, 1924, in the month of the death of Eugene Kerr, and that Elizabeth Kerr, Administratrix of the Estate of Joseph Kelly Kerr, deceased, do have and recover from the defendant The United States of America, the sum of $10,580, representing monthly installments of insurance that have accrued on or since July 8, 1924, to and inclusive of October 8, 1939, making the aggregate amount of this judgment to be $13,800, and it is

Further ordered and adjudged that 10% of each of said recoveries, to wit, a total of $1,380.00 be payable to and paid to Camden R. McAtee, attorney of record for said plaintiffs as the attorney fees allowable by law for services herein to said plaintiffs, and in reduction of the amounts payable to said plaintiffs.

On June 21, 1940, the Government filed a motion for the correction of this judgment in certain particulars.

Said motion does not question the correctness of the sum of $3,220 awarded to plaintiff as administratrix of the estate of Eugene Kerr, the designated beneficiary of the war risk insurance involved, who died June 24, 1924.

16 Said motion alleges, however, that the judgment rendered April 4, 1940, is erroneous and contrary to law in respect to the $10,580 awarded Elizabeth Kerr as administratrix of the estate of the insured, which amount represents the aggregate of the 184 monthly installments of $57.50 each remaining unpaid at the death of Eugene Kerr, the beneficiary of the insurance, on June 24, 1924.

The government contends that the amount due Elizabeth Kerr as administratrix of the estate of the insured should have been calculated on the basis of the present value of the 184 installments on the death of the beneficiary on June 24, 1924, in view of the provisions of Section 303 of the World War Veterans' Act, 1924, as amended March 4, 1925 (38 U. S. C. Sec. 514). So calculated, the Government says, the amount due the estate of the insured would be $8,234, less $6.50 the amount of the unpaid premium due on the insurance for November 1919.

Counsel for the administratrices, while objecting to any change being made in the judgment, apparently admits that $8,234 correctly represents the present value of the 184 monthly installments on the death of the beneficiary on June 24, 1924. (Plaintiffs' orig. memo. on motion, pp. 5-6.) Said counsel also admits that there should be deducted from the amount awarded the estate of the insured the sum of $6.50, the unpaid premium for November 1919. (Id.)

It is also apparent that if the judgment for the administratrix of the estate of the insured is to be reduced in either or both of the respects mentioned, the 10% of the amount recovered allowed plaintiffs' attorney should be corrected accordingly.

Counsel for plaintiffs objects to the correction of the judgment rendered April 4, 1940, on substantially the following grounds:

1. That the court has no authority in law or under the Federal Rules of Civil Procedure to correct the judgment.

2. That the judgment for the administratrix of the estate of the insured is correct, and does not come within the provisions of Section 303 of the World War Veterans' Act, 1924, as amended March 4, 1925, because no benefits under the insurance con-

17 tract had been awarded or paid prior to the judgment rendered April 4, 1940, and all of the monthly installments payable under said contract had accrued prior to said judgment. "Consequently", plaintiffs' reply brief (p. 3) states, "the last payment, in fact the only payment to the beneficiary herein, is the judgment of April 4, 1940, and the present value of the monthly installments thereafter payable, and accrued in the interval but always unpaid, is their full value awarded on April 4, 1940, to the estate of the insured."

STATUTE INVOLVED

"SEC 303. If no person within the permitted class be designated by the Act approved March 4, 1925, provides as to yearly renewable term insurance (43 Stat. 1310, c. 553, Sec. 14; 38 U. S. C. Sec. 514):

SEC. 303. If no person within the permitted class be designated as beneficiary for yearly renewable term insurance by the insured either in his lifetime or by his last will and testament or if the designated beneficiary does not survive the insured or survives the insured and dies prior to receiving all of the two hundred and forty installments or all such as are payable and applicable, there shall be paid to the estate of the insured the present value of the monthly installments thereafter payable, said value to be computed as of date of the last payment made under any existing award: *Provided*, That all awards of yearly renewable term insurance which are in course of payment on the date of the approval of this Act shall continue until the death of the person receiving such payments, or until he forfeits same under the provisions of this Act. When any person to whom such insurance is now awarded dies or forfeits his rights to such insurance then there shall be paid to the estate of the insured the present value of the remaining unpaid monthly installments of the insurance so awarded to such person: *Provided further*, That no award of yearly renewable term insurance which has been made to the estate of a last surviving beneficiary shall be affected by this amendment: * * * This section shall be deemed to be in effect as of October 6, 1917."

The Act of March 4, 1925, also amended Section 301 of the World War Veterans' Act, 1924, by incorporating therein the following provisions dealing with converted insurance (43 Stat. 1309, c. 553, Sec. 13; 38 U. S. C. Sec. 512):

"If no beneficiary within the permitted class be designated by the insured as beneficiary for converted insurance granted under the provisions of Article IV of the War Risk Insurance Act, or Title III of this Act, either in his lifetime or by his last will and testament, or if the designated beneficiary does not survive the insured, then there shall be paid to the estate of the insured the present value of the remaining unpaid monthly installments; or if the designated beneficiary survives the insured and dies before receiving all of the installments of converted insurance payable and applicable, then there shall be paid to the estate of such beneficiary the present value of the remaining unpaid monthly installments: * * *"

Said amended Section 301, in the next paragraph, authorizes optional settlements, in contracts of converted insurance, whereby

the insurance may be paid to the insured in one sum or in installments of thirty-six months or more, and to the beneficiary in installments of thirty-six months or more. Said paragraph concludes with the statement, "This section shall be deemed to be in effect as of June 7, 1924."

COMMISSIONER'S OPINION

In my opinion, defendant's motion to correct the judgment rendered April 4, 1940, should be granted.

I

AUTHORITY OF THE COURT TO CORRECT THE JUDGMENT

Rule 6 (c) of the Federal Rules provides that the expiration of a term of court shall not affect its power "to do any act or take any proceeding in any civil action which has been pending before it."

19 Rule 60 (a) provides that the court may at any time, of its own initiative or on motion, correct clerical mistakes in its judgments, orders, or other parts of the record.

Subdivision (b) of said Rule 60 provides:

"(b) Mistake; Inadvertence; Surprise; Excusable Neglect.—On motion the Court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. * * *"

Certain statements as to the scope of Rule 60 (b) made by former Attorney General Mitchell during the proceedings of the Institute of the American Bar Association on the new Rules, at Cleveland, Ohio, in July 1938, are pertinent here.

On page 324 of the volume containing said Rules and Proceedings, published by said Association, Mr. Mitchell is reported to have said:

"Rule 60. Relief from Judgment or Order. The first subdivision covers the case of clerical mistakes. Clerical mistakes may be corrected by the court at any time on its own initiative or on motion.

"Subdivision (b) is a provision for opening judgments, and that is a provision that may be used after a judgment has been entered by default or in fact after a judgment has been entered on any ground. Upon motion the court upon such terms as are just may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. Those are the terms and the lan-

guage of several statutes. As I recall, this particular language was taken directly from California."

Again, on page 329 of said volume, Mr. Mitchell said:

"I have here another question that I have just seen, from W. O. Wilson of Cheyenne, Wyoming: 'Referring to rule concern-
20 ing relief from judgments, many courts hold that courts have inherent power to correct their judgment at any time if such judgments do not speak the truth. Does this principle sustained by the United States Supreme Court still hold?'

"I should suppose it did. I think that the provisions that we have referred to in the rule itself (Rule 60 (b)) incorporate that. If they do not, you will notice that by the very exceptions we stated we tried to make it clear that we were not taking away any rights as to the correction of judgment."

And on page 380, Mr. Mitchell stated:

"Mr. Wales, of Chicago, asks: 'Does a District court ever lose the power to modify or vacate its own judgments upon grounds other than those stated in Rule 60? What is the effect of Rule 6 (c) in this connection?'

"Rule 6 (c) is the rule that says the expiration of the term does not affect the power of the court to deal with actions that are pending before it or have been pending. That is the only change that is made in the law. Of course a court loses power to vacate or modify its judgment except as provided in the rules and the statutes, when the judgment becomes final. * * *"

Since defendant's motion to correct the judgment was made within the six months allowed by Rule 60 (b), I think it should be granted, if said judgment does not comply with the legislation of Congress in the particulars sought to be remedied.

The fact that the judgment rendered April 4, 1940, was by consent of counsel, indicates that the attention of the court was not directed to any possible error therein.

It is to be noted that Rule 60 (b) covers judgments entered by mistake and inadvertence of the party against whom the judgment is rendered, or his representative, and is not confined to matters of surprise or excusable neglect.

Nor is the Government in the same position as a private person would be under similar circumstances. While the Government has consented to be sued in this class of cases, the court, in
21 rendering judgment, must comply with the legislation of Congress prescribing how amounts due under the insurance contract shall be paid, if such legislation be valid.

In a letter date December 19, 1940 (filed herewith) plaintiffs' counsel requests that Hines v. United States ex rel Marsh, 70 App. D. C. 206; 106 Fed. 2d 84, be considered in determining whether

the court has authority to correct the judgment rendered April 4, 1940.

In the Marsh case the insured veteran, through his legal guardian, obtained a judgment against the United States in a suit on his contract of war risk insurance. After said judgment had become final, the Comptroller General attempted to set off against it an amount found by the Administrator of Veterans Affairs to be due from the veteran because of disability compensation held by the Administrator to have been fraudulently obtained.

The Court of Appeals held that the alleged overpayment could not be recovered administratively, but that suit to establish such a set-off should have been seasonably brought by the Government, at the instance of the Comptroller General, under the statute regulating offsets on judgments and claims against the United States. (Act of March 3, 1933, c. 212, 31 U. S. C. Sec. 227.)

Manifestly, the Marsh case has no bearing upon the question presented by defendant's motion to correct the judgment rendered in this case on April 4, 1940.

Here, neither the Administrator of Veterans Affairs nor the Comptroller General is taking the matter of correcting said judgment into his own hands, but the administrative department of the Government is doing what the Court of Appeals said should have been done in the Marsh case, namely, seeking the judicial relief provided by law—in this case, rules of court which have the force of law.

II

Whether the Judgment Rendered April 4, 1940, Complies With Section 303 of the World War Veterans' Act, 1924, as Amended March 4, 1925

1. Purpose of said statute as shown by its legislative history

22 Section 402 of the War Risk Insurance Act of October 6, the insurance granted thereby in two hundred and forty equal monthly installments, and designating the permissible beneficiaries thereof, further provided:

"If no beneficiary within the permitted class shall be designated by the insured, either in his lifetime or by his last will and testament, or if the designated beneficiary does not survive the insured, the insurance shall be payable to such person or persons within the permitted class of beneficiaries as would under the laws of the States of the residence of the insured be entitled to his personal property in case of intestacy."

By the amendatory Act of December 4, 1919 (41 Stat. 375, 376), Congress, in Section 13 thereof, enlarged the permitted

class of beneficiaries, and in Sections 15 and 16 provided separately for the payment of yearly renewable term and converted insurance upon the death of the insured and the failure of beneficiaries, as follows:

"SEC. 15. That if any person to whom such yearly renewable term insurance has been awarded dies, or his rights are otherwise terminated after the death of the insured, but before all of the two hundred and forty monthly installments have been paid, then the monthly installments payable and applicable shall be payable to such person or persons within the permitted class of beneficiaries as would, under the laws of the State of residence of the insured, be entitled to his personal property in case of intestacy; and if the permitted class of beneficiaries be exhausted before all of the two hundred and forty monthly installments have been paid, then there shall be paid to the estate of the last surviving person within the permitted class the remaining unpaid monthly installments.

"SEC. 16. That if not beneficiary within the permitted class be designated by the insured as beneficiary for converted insurance, granted under the provisions of Article IV of the War Risk Insurance Act, either in his lifetime or by his last will and
23 testament, or if the designated beneficiary does not survive the insured, then there shall be paid to the estate of the insured the remaining unpaid monthly installments; or if the designated beneficiary survives the insured and dies before receiving all of the installments of converted insurance payable and applicable, then there shall be paid to the estate of such beneficiary the remaining unpaid monthly installments."

By Section 26 of the Act of August 9, 1921 (42 Stat. 148), a new section (Sec. 407) was added to Article IV of the War Risk Insurance Act, which section, so far as pertinent here, read:

"SEC. 407. If no person within the permitted class of beneficiaries survive the insured, then there shall be paid to the estate of the insured the monthly installments payable and applicable under the provisions of Article IV of the War Risk Insurance Act: * * *"

Thus the law on this subject stood until the passage of the World War Veterans' Act, 1924 (43 Stat. 607), which repealed the War Risk Insurance Act and its amendments, but reenacted many of its provisions, with some amendments.

Section 300 of the 1924 statute designated the permissible beneficiaries for both term and converted insurance, while Section 303 of said Act provided:

"SEC. 303. If no person within the permitted class of beneficiaries survive the insured, or if before the completion of payments the beneficiary or beneficiaries shall die and there be no surviving person within said permitted class, then there shall

be paid to the estate of the insured, the present value of the monthly installments thereafter payable under the provisions of this title: * * * This section shall be deemed to be in effect as of October 6, 1917."

While Section 303 of the 1924 statute inaugurated the method of paying the present or commuted value of the remaining monthly installments of insurance benefits accruing after the death of the insured or the designated beneficiary, it will be noted that said method did not become operative unless there was no surviving person within the permitted class of beneficiaries.

24 To remedy this situation, and discontinue (with certain exceptions) the further payment of insurance benefits on the installment plan, Congress, at the instance of the Director of the Veterans' Bureau, passed the Act of March 4, 1925, amending Sections 301 and 303 of the World War Veterans' Act, as set out above.

That such was the purpose of the Act of March 4, 1925, appears from an explanatory letter proposing amendments to Section 303 submitted by General Hines, Director of the Veterans' Bureau, to the House Committee on World War Veterans' Legislation on January 6, 1925. In said letter General Hines stated (Hearings before said Committee, 68 Cong. 2d Sess. on H. R. 10271, p. 94):

"Recommendation No. 13.—That Section 303, Title III, which provides for the distribution of insurance under certain circumstances, but which is incomplete, be repealed and a new section enacted to be known as Section 303 of the World War Veteran Act, such section to provide for the distribution of insurance when there is no designated beneficiary to take, either in the first instance or where the designated beneficiary dies and there is no alternate beneficiary named. The existing law provides for the distribution of insurance if no beneficiary is designated and the insured dies only where there is no person within the permitted class alive at the death of the insured, or if such person or persons dies and there is no surviving person within said permitted class. No provision is made in the law for distribution of insurance under either of the above-mentioned contingencies where members of the permitted class survive. It was at first thought that the provisions previously contained in the War Risk Insurance Act as amended with reference to this subject should be incorporated in the World War Veterans Act. However, the Bureau had encountered great administrative expense under the provisions of that act which still govern insurance issued prior to June 7, 1924, in attempting correctly to distribute insurance to persons of the permitted class who would take under the intestacy laws of the States. In many instances the payments are so divided as to result in absurdly small monthly amounts to a large number of persons.

25 "It is not believed that any good purpose is served by the method of distribution provided for in the War Risk Insurance Act as amended, and in view of this fact it is suggested that the amendment, which is necessary by reason of the incompleteness of the World War Veterans Act, be so written as to provide for the payment of such insurance as is payable where no beneficiary is named, or where the designated beneficiary dies without receiving all the installments, in one sum to the estate of the insured. The result of such a change in the law will not greatly affect the persons to take, but will affect the period of payments. The Bureau will be able under such an amendment immediately to discharge its obligation, rather than have to continue to send small amounts to a large number of persons over a period of twenty years. In a large number of cases these amounts are so small as to be of no material benefit to the persons receiving them."

I have quoted said recommendation from the appendix to the plaintiffs' response to defendant's memorandum submitted to me on December 13, 1940, with the underscoring as made by plaintiffs' counsel.

Plaintiffs' counsel seems to attach considerable significance to the fact that in said recommendation General Hines stated that the provisions of the War Risk Insurance Act still governed insurance issued prior to June 7, 1924.

Generally speaking, such was the case. While Section 303 as enacted June 7, 1924 provided that said section "shall be deemed to be in effect as of October 6, 1917," said section covered only the payment of insurance benefits where there was no surviving person within the permitted class of beneficiaries.

Moreover, Section 602 of the World War Veterans' Act, 1924, saved all rights and liabilities which had accrued under the War Risk Insurance Act and its amendments.

But whatever the scope of Section 303 as originally enacted, the last paragraph of General Hines' statement shows that the
26 amendment proposed was for the express purpose of correcting "the incompleteness" of original Section 303 in the respects mentioned by him; and as to the effect of such amendment he said that "The Bureau will be able under such an amendment immediately to discharge its obligation, rather than have to continue to send small amounts to a large number of persons over a period of twenty years."

It was, presumably, to effectuate said purpose, as well as to remove any doubt as to the retroactive nature of Section 303 as amended March 4, 1925, that Congress provided therein that said section, as so amended, should be retroactive to October 6, 1917. Furthermore, said amendatory Act contains no general provision

similar to Section 602 of the World War Veterans' Act, saving rights and liabilities previously accrued.

It is also to be noted that whereas, in the amendatory Act, Section 303, relating to term insurance, was made retroactive to October 6, 1917, Section 301, dealing with converted insurance, was made retroactive only to June 7, 1924.

H. R. 10271 was not passed, H. R. 12308 of the same Congress being substituted therefor. In reporting the latter bill, which became the Act of March 4, 1925, the House Committee on World War Veterans' Legislation said (H. R. Rept. 1518, on H. R. 12308, 68th Cong., 2d Sess.):

"20. Section 20 amends section 303 of the World War Veterans' act, in that it provides with reference to yearly renewable term insurance that where no beneficiary of the permitted class survives the insured, or if no beneficiary be designated by the insured during his lifetime the present value of the unpaid installments shall be payable to the estate of the insured. This measure is in the interest of economical administration on the part of the bureau and also to eliminate the necessity for continuing estates for indefinite periods. It also prevents those spectacles of injustice where the bureau by reason of the existing provisions of the law or the war risk insurance act as amended, as being paying absurdly small amounts monthly to a large class of beneficiaries. This section in no way affects the eventual liability of the United States, but it does accelerate to some extent that liability."

27 A similar statement was made in said Committee report as to the purpose of Section 19 of the bill amending Section 301 so as to make converted insurance payable to the estate of the insured, or to the estate of the beneficiary, according to the present value of the remaining monthly installments.

Said bill (H. R. 12308) was passed by the House, without amendment, on the day it was reported, and then sent to the Senate. In explaining the bill to the Senate, Senator Reed stated, with respect to the provisions which became Sections 13 and 14 of the Act of March 4, 1925 (66 Cong. Rec. pt. 5, p. 5262):

"The next section, which Senators will find beginning on page 45 and running over to page 48, simply puts into the law the regulations which are now in effect regarding commutation of payments in cases of death where the beneficiaries die and the law provides that the amount shall be paid to the man's estate if the beneficiaries disappear. Under the present law a man's estate has to be kept alive, its administration has to be kept going, sometimes for as long as 20 years. Nobody benefits from that. This section provides for a commutation and the payment of the present value of the insurance to the administrator or executor of the insured person."

2. JUDICIAL CONSTRUCTION OF SECTION 303 AS AMENDED MARCH 4, 1925

The difference between Section 303 of the World War Veterans' Act as enacted June 7, 1924, and said section as amended by the Act of March 4, 1925, is thus stated by the District Court, Northern District of New York, in Hatch v. United States, 29 F. 2d 213, 220, decided November 7, 1928:

"As originally enacted on June 7, 1924, section 303 merely provided that, if no person within the permitted class of beneficiaries survived the insured, or if before the completion of payments the beneficiary should die, there being no surviving person within said permitted class, then the insurance, or the remainder thereof, should be paid to the estate of the insured in a lump sum. This covered a very limited field, being confined to cases where there were no persons within the permitted class who survived the insured in the one case, or who survived the beneficiary in the other case.

"The department had found the long-continued monthly payments burdensome, and sought to have it changed to a lump sum liquidation plan. Congress by the amendment of March 4, 1925, expanded the field covered by Section 303 to include additional cases. As thus amended, section 303, in the provision prior to the proviso, was made to cover the following cases of award and payment of insurance to deceased soldiers: (1) Where no person is designated as beneficiary. (2) Where the designated beneficiary does not survive the insured. (3) Where the designated beneficiary survives the insured, but dies before receiving all of the 240 installments.

"In all such cases, the amended section provides that the payment of the insurance, or the remainder thereof, should be made in a lump sum to the estate of the insured, regardless of whether or not there are survivors within the permitted class, and not as under Section 402 of the former act, to the heirs of the insured in monthly payments for 20 years."

In the Hatch case the insured died on October 12, 1918, without having designated any beneficiary in his lifetime, and the Bureau, on August 12, 1919, awarded and began payment of the insurance to his father and three brothers, but failed to include his mother, the applicable statute then being Section 402 of the War Risk Insurance Act of October 6, 1917, as amended June 25, 1918. In November, 1925, the Bureau terminated all payments under the award, and, after first holding that the mother should have been included in said award, and then that the nephews of the insured who had been designated by the insured in his will as his beneficiaries were entitled to the insurance, finally ruled, on

September 14, 1926, that the commuted value of the balance
29 of the insurance was payable to the executor of the estate of the insured under Section 303 as amended March 4, 1925. Thereupon a suit in equity was brought by the father and brothers of the insured to have the Government resume payments of the awards made to them in 1919.

Notwithstanding the great difference between Section 303 as originally enacted and as amended by the Act of March 4, 1925, and the fact that the amended section was made effective as of October 6, 1917, the District Court held that the amended section did not apply to the insurance there in suit because Section 602 of the World War Veterans' Act, 1924, provided that the repeal by said Act of the War Risk Insurance Act and other statutes should not affect any act done or any right or liability accrued under said Acts. Said court also held that, in any event, the awards were in course of payment within the meaning of the first proviso of Section 303 as amended by the Act of March 4, 1925.

I think the District Court, in the Hatch case, correctly held that the award made by the Bureau to the father and brothers of the insured in 1919 came within the first proviso of Section 303 as amended March 4, 1925, but that said court was mistaken as to the bearing of Section 602 of the World War Veterans' Act, 1924 upon the amendment of Section 303 by the Act of March 4, 1925.

As I read Section 303 as amended by the Act of March 4, 1925, it was intended to supersede all prior legislation with respect to the payment of amounts or balances due under contracts of yearly renewable term insurance, upon the death of the insured or the designated beneficiary, said purpose being evidenced by the history of said statute referred to above, the exceptions stated in the provisos thereto, and the final statement therein that "This section shall be deemed to be in effect as of October 6, 1917."

Moreover, I am unable to perceive why the general saving clause in Section 602 of the 1924 statute should be held to control the particular and specific expression by Congress of its will in regard to the payment of yearly renewable term insurance in the 1925 statute. Certainly, the general rule is that the later statute controls, except as otherwise stated therein. Section 303, as amended in 1925, contains its own limitations.

30 If, prior to the Act of March 4, 1925, the designated beneficiary or any other person or estate, had acquired a *vested right* to receive payment of the remaining monthly installments as they accrued, a different situation would be presented. But the decisions of the Supreme Court as to rights of beneficiaries refute such a view.

White v. United States, 270 U. S. 175, decided March 1, 1926.

Singleton v. Cheek, 284 U. S. 493, decided February 15, 1932.
McCullough v. Smith, 293 U. S. 288, decided December 3, 1934.

Thus, in the White case, the Supreme Court, speaking by Mr. Justice Holmes, and referring to the contention that the mother's interest as the designated beneficiary of her son's war risk insurance "vested as absolute at the son's death, and could not be defeated by later legislation," said (270 U. S. at p. 180), italics mine:

"The certificate of insurance provided in terms that it should be 'subject in all respects to the provisions of such act (of 1917), of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance, and the terms and conditions published under authority of the Act, shall constitute the contract.' These words must be taken to embrace changes in the law no less than changes in the regulations. The form was established by the Director with the approval of the Secretary of the Treasury and on the authority of Article I, Sec. 1, and Article IV, Sec. 402, of the Act, which, we have no doubt, authorized it. The language is very broad and does not need precise discussion when the nature of the plan is remembered. The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it and the relation of the Government to them if not paternal was at least avuncular. It was a relation of benevolence established by the Government at considerable cost to itself for the soldier's good. It was a new experiment in which changes might be found necessary, or at least, as in this case, feasible more exactly to
31 carry out his will. *If the soldier was willing to put himself into the Government's hands to that extent no one else could complain. The only relations of contract were between the Government and him. White's mother's interest at his death was vested only so far as he and the Government had made it so, and was subject to any conditions upon which they might agree. They did agree to terms that cut her rights down to one-half.*" She is a *volunteer* and she cannot claim more. See Helmholz v. United States, 294 Fed. 417, affirming 283 Fed. 600. Gilman v. United States, 294 Fed. 422, affirming 290 Fed. 614.

The agreement as to the terms and conditions of the insurance contract, to which the Supreme Court referred in the White case, was the provision in the certificate of insurance that such insurance should be "subject in all respects to the provisions of such Act (of 1917), of any amendments thereto," etc. The decision in the White case was, therefore, not rested upon the fact (as plaintiffs' counsel in the case at bar suggests) that when White applied for the insurance he had indicated a desire that one-half of the insurance should go to his aunt, not then within the permissible class

of beneficiaries, but who was later brought within that class by the amendatory Act of December 24, 1919.

The broad authority of Congress over the subject of beneficiaries established by the decision of the Supreme Court in the White case was recognized by the District Court in the Hatch case, supra, which sought to distinguish the Hatch case on the ground that the amendment of Section 303 made by the Act of March 4, 1925, was not to be given a retroactive effect—a view which, for the reasons stated above, I think untenable.

The Hatch decision as to the non-retroactive effect of the Act of March 4, 1925, is not only inconsistent with the principles announced as to the nature of the beneficiary's right in White v. United States, but is also in conflict with the decisions of the Supreme Court in Singleton v. Cheek and McCullough v. Smith, supra, which were decided after the Hatch case.

32 Thus, in Singleton v. Cheek, referring to the amendment to Section 303 made by the Act of March 4, 1925, the Supreme Court said (284 U. S. at p. 407):

The amendment, in express terms, was made retroactive so as to take effect as of October 6, 1917, a provision undoubtedly within the power of Congress, for the reasons stated by this court in White v. United States, 270 U. S. 175.

"By that amendment, the rule, which, upon the happening of the contingencies named in the prior acts, limited the benefit of the unpaid installments to persons within the designated class of permittees, was abandoned, and 'the estate of the insured' was wholly substituted as the payee. All installments, whether accruing before the death of the insured or after the death of the beneficiary named in the certificate of insurance, as a result, became assets of the estate of the insured upon the instant of his death, to be distributed to the heirs of the insured in accordance with the intestacy laws of the state of his residence, such heirs to be determined as of the date of his death, and not as of the date of the death of the beneficiary. The state courts, with almost entire unanimity, have reached the same conclusion."

And in the McCullough case, the Supreme Court said (293 U. S. at p. 231):

"Considering what was said in United States v. Worley, 281 U. S. 339, 341, and in Singleton v. Cheek, supra, together with the language and evident purpose of the act of 1924 as amended, we think it clear enough that installments which accrued in favor of the father and mother of Reid as beneficiaries during their lives became the property of their respective estates. *Also that installments which accrued to the assured during his lifetime, and the commuted value of the installments payable subsequent to the mother's death, became the property of his estate.*"

33 There is nothing in Lynch v. United States, 292 U. S. 571 which conflicts with the views announced by the Supreme Court in the White, Singleton and McCullough cases as to the power of Congress to control the payment of yearly renewable term insurance to beneficiaries under the insurance contract. On the contrary the doctrine of the White case was expressly recognized by the court in the Lynch case.

It is true it was held in the Lynch case that the insurance constituted a contract between the soldier and the Government—but that view of the insurance had theretofore been recognized in the White case. It was also held in the Lynch case that while the payment of the insurance could be regulated by Congress, by extending the class of beneficiaries and changing the method of payment, (see statutes referred to by the court in the notes to the opinion), "no power to curtail the amount of the benefits which Congress contracted to pay was reserved to Congress; and none could be given by any regulation promulgated by the Administrator."

Manifestly, Section 303 of the World War Veterans' Act, 1924, as amended March 4, 1925, in providing that the present value of the monthly installments remaining unpaid on the death of the insured or of the designated beneficiary, does not curtail the amount due under the insurance contract, but merely facilitates its payment.

In Lopez v. United States, 82 F. 2d 982, 987, the Circuit Court of Appeals for the Fourth Circuit, in dealing with the question of limitations, referred to the statutes I have been discussing, as to which that court said:

"* * * The result of these enactments is that when a liability under a policy is established, but the insurance has not been paid prior to the death of the insured, the installments which would have accumulated from the date of the insured's permanent and total disability to the date of his death should be paid to his estate, while those which would have accumulated from his death to the
34 date of the death of the beneficiary should be paid to the estate of the beneficiary, and the commuted value of the installments remaining should be paid to the estate of the insured." McCullough v. Smith, 293 U. S. 228, 55 S. Ct. 157, 79 L. Ed. 297; Pagel v. Pagel, 291 U. S. 473, 54 S. Ct. 497, 78 L. Ed. 921; Singleton v. Creek, 284 U. S. 493, 52 S. Ct. 257, 76 L. Ed. 419, 81 A. L. R. 923.

The law of the present case is not changed by the fact that when the judgment sought to be corrected was rendered, sufficient time had elapsed from the death of the beneficiary to pay all of said 184 monthly installments of insurance benefits.

Moreover, upon the refusal of the Bureau, in its letter of March 6, 1920, to recognize the insurance as being in force, the beneficiary, under the legislation of Congress then in force, might immediately have brought suit on the insurance contract; and if such a suit had been prosecuted to a successful conclusion prior to the passage of the World War Veterans' Act, 1924, or of the amendment Section 303 of the Act of March 4, 1925, payment on the monthly installment plan might possibly have been obtained under the earlier statutes. This suit was not filed, however, until November 6, 1925.

Regardless of the persons or circumstances responsible for the long delay in bringing this suit to a conclusion, the right of the estate of the insured to the present value of the installments of insurance here in question was definitely fixed by the Act of March 4, 1925, as of the date of the beneficiary's death. Nothing in the way of compensation for such delay can be allowed by the court, even if the delay were attributable to the Government or its agents, since Congress has not authorized the payment of interest or damages on past due installments of war risk insurance benefits. (United States v. Worley, 287 U. S. 399.)

3. ADMINISTRATIVE CONSTRUCTION OF SECTION 303 AS AMENDED MARCH 4, 1925

The administrative construction of Section 303 of the World War Veterans' Act, 1924, as amended March 4, 1925, appears to have started with an opinion dated May 14, 1925, rendered
35 by the General Counsel of the Veterans' Bureau to the Director in the case of Arthur O'Neill Cody. Copies of this and two prior opinions of the General Counsel in the Cody case, dated respectively November 4, 1924, and January 7, 1925, are attached to a memorandum for defendant filed with this report.

It appears from said opinions that Cody died, June 5, 1922, leaving no surviving relatives within the permitted class; that he had previously been awarded permanent and total benefits under his insurance contract, and that pursuant to an opinion of the Bureau dated April 6, 1923, the remaining monthly installments were awarded to the executor of his estate under the provisions of Section 407 of the War Risk Insurance Act.

In the General Counsel's opinion of November 4, 1924, it was held that, under Section 303 as enacted June 7, 1924, the present value of the remaining monthly installments might be paid to the executor, using the term present value to mean the installments of renewable term insurance "purged of all interest." In so holding the General Counsel followed an opinion of his office of June

20, 1924, which held that the provision for paying the present value of the remaining installments contained in said section did not deprive any person of any substantial rights, and therefore Section 602 of said Act did not apply.

On January 7, 1925, the General Counsel rendered another opinion in the Cody case in which he held that Section 303 as originally enacted was retroactive to October 6, 1917, and that the expression (if before the completion of payments the beneficiary or beneficiaries shall die * * * then there shall be paid to the estate of the insured the present value of the monthly installments thereafter payable) referred "to the date of the death of the beneficiary or beneficiaries or the date of the death of the insured where no beneficiary within the permitted class survives him."

Said opinion further stated:

36 "From the foregoing conclusions it is the opinion of this office that the present value of the remaining monthly installments of insurance must be calculated from the date of the death of the beneficiary or beneficiaries or from the date of the death of the insured in those cases in which no beneficiaries within the permitted class survive the insured, regardless of whether the death occurred prior or subsequent to June 7, 1924."

This decision was approved by the Director on June 10, 1925.

The Cody case (along with two others) was the subject of still another opinion of the General Counsel to the Director of the Veterans Bureau, rendered May 14, 1925. Said opinion dealt with the interpretation of Section 303 as amended March 4, 1925, and particularly its requirement that the present value of the remaining installments be computed as of the date of the last payment made under an existing award.

In his opinion of May 14, 1925, the General Counsel stated that the insured had been paid monthly installments of insurance from November 1, 1918, to June 30, 1922, and that the remaining installments had been awarded to his executor under Section 407 of the War Risk Insurance Act to run from July 1, 1922, to October 31, 1938. He then quoted the clause in Section 303 as amended March 4, 1925, as to how the present value of the remaining monthly installments should be computed, and said:

"This office will, therefore, amend its prior opinion in view of the change in the language in Section 303 to the effect that the present value is to be computed as of the date of last payment made under any existing award. In the Cody case it would appear that the existing award is that to the executor to run from July 1, 1922, to October 31, 1938. If this statement be correct then the present value of the remaining term insurance should be computed as of the date of the last payment under that award.

* * * * * *

37 "The Claims and Insurance Service suggests that the date of last payment should be construed to mean the last day of the calendar month under the Bureau's system of payment. While it may be true that as a matter of convenience insurance awards are paid by calendar months, nevertheless, attention is called to the fact that insurance does not accrue on the basis of a calendar month as that term is popularly understood. The insurance accrues in months reckoning from the anniversary date of the insured's death and it is the opinion of this office that in computing the present value of the insurance the computation should be based upon the anniversary date rather than upon the last day of the calendar month."

This opinion also bears the approval of the Director.

The decision of the Comptroller General, rendered January 26, 1926, in the case of Russell W. Walker, 5 Comp. Gen. 501, also supports the views expressed in this report as to the application of Section 303 as amended March 4, 1925. In that decision the Comptroller General advised the Director of the Veterans Bureau:

"The policy of insurance issued to Russell W. Walker, considered as never having lapsed because of uncollected disability compensation, matured by the happening of permanent total disability October 1, 1920, and the installments of insurance which should have been paid to the insured during his lifetime were properly awarded to the administrator of his estate. The rights of the death beneficiary to the remaining unpaid installments became fixed at the date of death of the insured, February 18, 1921, under the provisions of law then effective.

* * * * * *

"Under section 402 of the war-risk insurance act, as amended by the act of June 25, 1918, 40 Stat. 615, 616, award should have been made to such person or persons within the permitted class of beneficiaries as would under the laws of the State of the
38 residence of the insured be entitled to his personal property in case of intestacy * * *.

"But as no such award appears to have been made, payment should now be made to the estate of the insured under the provisions of section 303 of the World War veterans' act as amended by section 14 of the act of March 4, 1925, 43 Stat. 1310, which is retroactively effective to October 6, 1917, except in so far as affecting payments under existing awards legally made."

The above decisions of the General Counsel of the Veterans Bureau and the Comptroller General appear to have established the administrative construction of Section 303 as amended March 4, 1925, and no departure therefrom appears to have been sanctioned by either official. On the contrary, it was because of the refusal of the Comptroller General to approve the judgment

rendered by this court on April 4, 1940, in respect to the amount allowed the administratrix of the estate of the insured, that this motion to correct said judgment was made.

4. AS TO THE CLAUSE IN AMENDED SECTION 303 REQUIRING THAT THE PRESENT VALUE OF THE UNPAID MONTHLY INSTALLMENTS BE COMPUTED AS OF THE DATE OF THE LAST PAYMENT UNDER AN EXISTING AWARD

Neither in the report of the House Committee on World War Veterans' Legislation on H. R. 12308, nor in Senator Reed's statement thereon was any reference made to the above-mentioned clause in Section 303, as amended March 4, 1925.

This is not surprising, since said clause relates to a matter of administrative detail, which would only arise where, on the death of the insured or of the designated beneficiary, there was an existing award under which some payment had been made. There was no such award in this case, so that there is no necessity for inquiring as to the exact scope of said clause. One phase of its application is discussed in the last paragraph of the opinion of the General Counsel of the Veterans Bureau of May 14, 1925, set out above.

39 Plaintiffs' counsel argues as if it were essential to the operation of amended Section 303 that there be an existing award at the time of the death of the insured or the designated beneficiary; but manifestly this is not so. The fundamental purpose of the amended section was to discontinue, except as stated therein, further payments on the monthly installment plan upon the death of the insured or the designated beneficiary, by paying the balance then due under the insurance contract in a lump sum.

Counsel for plaintiffs further contends that, since no award of benefits was ever made under the contract of insurance involved in this case, the judgment rendered by this court on April 4, 1940, in favor of the beneficiary's estate should be taken as such an award, and the date of said judgment, or the date of payment under said judgment, should be taken as the date upon which the present value of the remaining 184 installments should be calculated.

This contention ignores the fact that the only payment authorized by amended Section 303 to be made to the estate of the insured is the present value, on the death of the beneficiary, of the installments thereafter payable; while the insured's estate is here claiming the aggregate value of such monthly installments on a much later date.

5. AS TO THE METHOD OF COMPUTING THE PRESENT VALUE OF THE REMAINING 184 INSTALLMENTS

The basis for defendant's calculation of the present value of the 184 monthly installments of insurance benefits remaining unpaid on the death of the beneficiary on June 24, 1924, is shown by a letter, dated December 21, 1940, from the Director of Insurance of the Veterans' Administration to the Director of the Bureau of War Risk Litigation in the Department of Justice. Said letter (filed herewith) states:

40 "In compliance with your telephonic request for an explanation as to how commuted values are calculated, with special reference to the case of Joseph Kelly Kerr and the commuted or present value of 184 monthly installments, the following is submitted for your consideration.

"The present or commuted value of a monthly annuity certain due, that is, a series of payments made at the beginning of each month for a specified number of months, is that amount which is placed at interest at a certain assumed rate will provide for the payment of each installment as it falls due. When the last installment falls due the amount in the fund will exactly equal this installment and the fund will be exhausted. Thus it will be seen that each monthly payment after the first is made up partly of principal and partly of interest. When a series of payments is given and it is desired to obtain the commuted or present value of the series, each payment falling due after a certain date is discounted back to that date and the sum of the discounted values is the present or commuted value of the series of installments.

"$10,000 is the commuted or present value of 240 monthly installments of $57.50 each on a 3½% interest basis.

"Insured died Nov. 8, 1919—Beneficiary died June 28, 1924.

"56 installments of $57.50 each from Nov. 8, 1919, to June 8, 1924, inclusive, $3,220.00.

"Commuted or present value of remaining 184 installments of $57.50 each is $8,233.5788, $8,234.00.

"This commuted or present value is the sum that will purchase 184 installments of $57.50 each, payable monthly, on a basis of 3½% interest, compounded annually."

It will be noted that Section 301 of the World War Veterans' Act, 1924, as amended March 4, 1925, provides:

41 "The insurance except as provided herein shall be payable in two hundred and forty equal monthly installments. Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash,

loan, paid up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. All calculations shall be based upon the American Experience Table of Mortality and interest at 3½ per centum per annum, except that no deduction shall be made for continuous installments during the life of the insured in case his total and permanent disability continues more than two hundred and forty months. Subject to regulations, the insured shall at all times have the right to change the beneficiary or beneficiaries without the consent of such beneficiary or beneficiaries, but only within the classes herein provided."

CONCLUSION

For the reasons stated above, I recommend that defendant's motion to correct the judgment rendered by this court on April 4, 1940, be sustained, and said judgment corrected as set forth in the form of order submitted with this report.

Respectfully submitted.

WILLIAM R. HARR,
Commissioner, Veterans' Cases.

cc CAMDEN R. MCATEE,
Attorney for Plaintiff.
United States Attorney.

42 *The orders appealed from*

ORDER CORRECTING JUDGMENT RENDERED APRIL 4, 1940, AND OVERRULING MOTION FOR AWARD OF INTEREST

Entered Jan. 9/41

This matter coming on to be heard upon defendant's motion to correct the judgment rendered by this Court on April 4, 1940, and entered April 5, 1940; and the Court finding:

(1) That no question is made by defendant as to the correctness of the amount of $3,220 awarded by said judgment to the plaintiff, Elizabeth Kerr, administratrix of the estate of Eugene Kerr, beneficiary of the insurance contract sued upon, which sum represents the aggregate of the 56 monthly installments of $57.50 each accruing from the death of the insured on November 8, 1919, to the death of the beneficiary on June 24, 1924.

(2) That the amount of $10,580 awarded by said judgment to the plaintiff, Elizabeth Kerr, administratrix of the estate of the

insured, Joseph Kelly Kerr, is based upon the aggregate value of the 184 monthly installments of $57.50 each payable through October 1939 after the death of the beneficiary on June 24, 1924, and not upon the present value of said installments as computed on said date, as required by Section 303 of the World War Veterans' Act, 1924, as amended March 4, 1925 (38 U. S. C. Sec. 514), and is thereby in error, which error, the court finds, is the result of mistake and inadvertence on the part of counsel for the defendant in consenting to said judgment award for entry by the Court.

(3) That the present or commuted value of said remaining 184 monthly installments of $57.50 each, on the death of the beneficiary on June 24, 1924, calculated on a 3½% interest basis, as provided in Section 301 of the World War Veterans' Act, 1924, as amended March 4, 1925, is $8,234.00.

43 (4) And that the sum of $6.50 is admitted by counsel for plaintiffs to be due and owing the United States on account of unpaid premium on said insurance for November 1919:

It is this 9th day of Jan. 1941, ordered, adjudged, and decreed, That the judgment for $3,220 rendered by this court on April 4, 1940, in favor of the plaintiff Elizabeth Kerr, administratrix of the estate of Eugene Kerr, beneficiary of the insurance contract sued upon, is correct and is hereby confirmed; subject as therein provided to the payment to Camden R. McAtee, attorney of record for said plaintiff, of ten percent of said judgment, to wit, $322, for legal services to said plaintiff in this suit and in reduction of the amount payable to said plaintiff.

It is further ordered, adjudged, and decreed, That the judgment for $10,580 rendered by this court on April 4, 1940, in favor of the plaintiff Elizabeth Kerr, administratrix of the estate of the insured, Joseph Kelly Kerr, be and it is hereby reduced, nunc pro tunc, to $8,227.50, which last-mentioned amount represents the present value on June 24, 1924, the date of death of the beneficiary of the insurance contract, of the 184 monthly installments of insurance contract benefits of $57.50 each thereafter payable through October 1939, after deducting therefrom the sum of $6.50 on account of the unpaid premium on said insurance for November 1919, and that said plaintiff do have and recover from the defendant the said sum of $8,227.50 as of April 5, 1940, subject to the payment to Camden R. McAtee, attorney of record for said plaintiff, of ten percent thereof, to wit, $822.75, for legal services to said plaintiff in this suit, and in reduction of the amount payable to said plaintiff.

* * * Ordered that said plaintiff's motion for award of interest upon the judgment awards of recovery be and same is overruled.

44 *Notice of appeal from parts of judgment and final order*

Filed January 23, 1941

To Hon. EDWARD M. CURRAN,
United States District Attorney for the District of Columbia:

Notice is hereby given that Elizabeth Kerr, Admx. of the Estate of Joseph Kelly Kerr, deceased, plaintiff herein, hereby appeals to the United States Court of Appeals for the District of Columbia from the parts of the final judgment and order entered in this action on January 9, 1940, which provide, respectively, as follows:

(a) "That the judgment for $10,580 rendered by this Court on April 4, 1940, in favor of the plaintiff Elizabeth Kerr, administratrix of the estate of the insured, Joseph Kelly Kerr, be and it is hereby reduced, nunc pro tunc, to $8,227.50, which last-mentioned amount represents the present value on June 24, 1924, the date of death of the beneficiary of the insurance contract, of the 184 monthly installments of insurance contract benefits of $57.50 each thereafter payable through October 1939, after deducting therefrom the sum of $6.50 on account of the unpaid premium on said insurance for November 1919, and that said plaintiff do have and recover from the defendant the said sum of $8,227.50 as of April 5, 1940, subject to the payment to Camden R. McAtee, attorney of record for said plaintiff, of ten percent thereof, to wit, $822.75, for legal services to said plaintiff in this suit, and in reduction of the amount payable to said plaintiff."

(b) That the plaintiff motion for award of interest upon the judgment award entered on April 4, 1940, be and same is overruled.

45 *Order as to appeal undertaking*

Entered January 23, 1941

The plaintiff having filed her notice of appeal to the United States Court of Appeals for the District of Columbia from the judgment and order entered herein on January 9, 1941, and having moved for a limited cost bond, or undertaking, and the Court being advised, it is this 23rd day of January 1941,

Considered and ordered that the penalty of said bond or undertaking on said appeal be and the same is fixed at the sum of $100.00 with leave to deposit in the court Registry the sum of $50.00 in cash in lieu of such bond or undertaking.

Memorandum

February 21, 1941

Deposit $50.00 by McAtee in lieu of bond on appeal.

46 *Points relied on by Appellant*

Where 240 monthly installments of $57.50 each of term insurance, payable but unpaid between November, 1919 and October, 1939, had entirely accrued, and, in April, 1940, were judicially to be awarded as recoveries separately to the Estate of the Beneficiary, who died after surviving insured, in the amount of the installments payable and applicable as accrued at the death of the beneficiary in June, 1924, and to the Estate of the insured in the amount of the present value of the installments thereafter payable computed as of date of last payment made under any existing award:

I—The material points of appellant are (1) that the April, 1940, judgment award of $10,580.00 to the Estate of insured as the uncommuted amount of the installments payable after June 1924, after judgment award to the Estate of the beneficiary, is the correct application of Section 303, World War Veterans' Act, as amended March 3, 1925; and (a) alternatively, that any correction thereof is to be made by direction of the Comptroller General of the United States under the Act of 1933, with allowance of interest upon amounts withheld and determined to be in excess of the demand of the United States; and therefore:

That the Court below erred:

(a) In holding Section 303 limits the judicial award to the Estate of the insured to the present commuted value, at the date of death of the beneficiary, of the monthly installments thereafter payable.

(b) In not holding judicial award to the estate of the beneficiary is determinative of the date of last payment under any existing award for purposes of the statutory commutations, if any, of the monthly installments, payable after death of the surviving beneficiary, into present value for judicial award thereof to the estate of the insured.

(c) In holding the remedy for seeking correction of said judgment award for $10,580.00 was Rule 60, F. R. C. P., and not the Act of 1933 applicable to judgment recoveries against the United States.

47 (d) In holding said judgment award of $10,580 was subject to correction as in error because of mistake or inadvertence of defendant counsel in consenting to its entry.

(e) In holding plaintiff not entitled to interest upon the amount of said judgment award not in controversy and withheld from payment.

II—That the Court below erred:

In that the orders appealed from (a) are not sustained by, and are contrary to the facts and evidence, (b) are contrary to law, and (c) their reversal upon law and fact is required in the interest of justice.

48 *Order of approval of agreed case*

Filed March 4, 1941

The parties by their attorneys having tendered herein an agreed statement of the case for approval and certification as the record upon appeal herein, and the Court being advised, it is this 4 day of March 1941,

Considered and ordered that said Agreed Statement be and same is approved as conforming in all respects to the truth and stating fully all matters necessary to present the questions raised by the appeal herein, and that same be certified to the United States Court of Appeals for the District of Columbia as the record upon said appeal.

49 *Approval of parties*

The undersigned as attorneys for the appellant and appellee herein hereby approve the foregoing agreed statement as a true and correct presentation of all matters of record pertaining to decision of the appeal, and consent that same be approved by the trial court herein, and certified to the appellate court as the record on appeal.

CAMDEN R. MCATEE,
Attorney for Appellant.
EDWARD M. CURRAN,
Attorney for Appellee,
U. S. Att.
Per J. B. C.

50 In District Court of the United States for the District of Columbia

[Title omitted.]

Order extending time

Filed March 4, 1941

The parties having this day tendered an agreed statement of the case, presenting the questions upon the appeal herein for

approval and certification thereof to the Court of Appeals, and it appearing the time allowed by rule for said approval and certification has not expired and extension thereof is necessary and has not heretofore been granted, it is this 4th day of March 1941:

Ordered that the time for filing said record and docketing the action be and same is extended ten days.

(S) F. DICKINSON LETTS,
Justice.

(S) CAMDEN R. MCATEE,
Attorney for Plaintiff.

No objection:

EDWARD M. CURRAN,
Attorney for Defendant.
U. S. Att.

51 District Court of the United States for the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 50, both inclusive, to be a true and correct transcript of the record, in accordance with Rule 76 of the Rules of Civil Procedure for the District Courts of the United States, in cause No. 70830 at Law, wherein Elizabeth Kerr, as Administratrix of the estate of Joseph Kelly Kerr, deceased, &c., is Plaintiff and The United States of America is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 6th day of March 1941.

[SEAL] C. E. STEWART, *Clerk.*

53 In United States Court of Appeals for the District of Columbia

No. 7847

ELIZABETH KERR, ADMINISTRATRIX OF THE ESTATE OF JOSEPH KELLY KERR, DECEASED, APPELLANT

v.

THE UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the District of Columbia

Decided June 30, 1941

Mr. Camden R. McAtee for appellant.

Mr. Keith L. Seegmiller of the Department of Justice, with whom Mr. Edward M. Curran, United States Attorney, Mr. Julius C. Martin, Director, Bureau of War Risk Litigation, and Mr. Wilbur C. Pickett, Special Asst. to the Attorney General, were on the brief, for appellee.

Before GRONER, Chief Justice, and MILLER and VINSON, Associate Justices.

Opinion

VINSON, Associate Justice: Joseph Kelly Kerr died on November 8, 1919. At that time he had in effect, as held by this court on December 4, 1939,[1] a policy of war risk insurance. Accordingly on April 5, 1940, the District Court entered a judgment of $3,220 for the estate of Eugene Kerr, the beneficiary under the policy, and a judgment of $10,580 for the estate of Joseph Kelly Kerr. On January 9, 1941, an order was entered reducing the latter judgment to $8,227.50. From that order this appeal is taken.

In the view we take of the case the sole question is as to how the amount of the judgment should be computed. The computation concerns the government's obligation to the estate of Joseph Kelly Kerr for 184 instalments. At one time the government met such an obligation by the continuance of the monthly payments. The statute was changed on June 7, 1924, retroactive to October 6, 1917, authorizing a single lump sum payment. The amount of this single payment was figured at the present value of the remaining instalments.

Under this state of the law the Veterans' Bureau was presented with the Cody case. Cody became permanently disabled on November 1, 1918. He received monthly benefits until his death on June 5, 1922. His executor received an award for instalment payments till October 31, 1938. These were paid until June 7, 1924,
the date of the lump sum statute. Under that statute it
54 was determined that the value of the lump sum payment was to be figured as of the date of Cody's death. That amount was ascertained and then the amount of the instalments already paid was deducted.

Then the Veterans' Bureau sponsored an amendment which became law on March 4, 1925, providing that the present value of the remaining instalments should be figured from the time of the last payment under any existing award. The Cody case was redetermined in accordance with this statute.

The pertinent statutory provision now reads:

"* * * if the designated beneficiary * * * survives the insured and dies prior to receiving all of the two hundred and forty installments or all such as are payable and applicable, there

[1] Kerr v. United States, 71 App. D. C. 222, 108 F. (2) 585.

shall be paid to the estate of the insured the present value of the monthly installments thereafter payable, said value to be computed as of date of last payment made under any existing award: * * * This section shall be deemed to be in effect as of October 6, 1917." [2]

Here, the insured died on November 8, 1919. The beneficiary died on June 24, 1924. The District Court entered judgment on April 5, 1940. No payments to the insured, his beneficiary, or the estates were made before the critical 240 months had passed after the insured's death, or before the court entered its judgment. The issue now before us is the computation of the 184 instalments payable to the estate of the insured. The government argues that the correct method is to take the present value of the 184 instalments as of the date of the beneficiary's death, $8,234.00.[3] The appellant claims that the correct method is to take the full value of the 184 instalments, $10,580.

This appears to be another instance of that frequently recurring situation in the law where the legislators had certain specific problems in mind but not this one when they passed an amendment. The 1924 amendment was passed to get away from long drawn out meagre monthly payments. The 1925 amendment was passed undoubtedly to resolve problems like that of the Cody case.

If the apparent rationales of the method of computation in the 1924 and 1925 amendments are considered this case is of easy resolution. The immediate reason for the 1924 amendment as has been noted was to avoid long continued small monthly payments. But after deciding on the lump payment, why was the amount set at the present value of the instalments rather than the total of what the instalments would be? Undoubtedly because the recipient immediately obtained the full use of the money. This is such a common method of determining value in annuities and the like that it calls for no further discussion. Then why did the 1925 amendment provide for the determination of the present value as of the last instalment payment rather than as of the date of the death of the insured or beneficiary? Undoubtedly because experience had revealed situations like the Cody case in which the determination of
55 present value as of a date previous to the last instalment payment assumes a use of money by the estate which it in fact never had.

Here the appellant's claim was not recognized till after more than the 240 months had passed. Applying the principles of computation shown in the 1924 and 1925 amendments there can be no doubt but that the appellant is entitled to the full value of his

[2] 38 U. S. C. A. § 514.

[3] The $6.50 difference betwen this figure and that of the amended judgment, $8,227.50, represents a deduction for premium due in the month of grace. See footnote 1.

share of those instalments (184). That is the sound result for this case. We are not impressed by the government's argument that under this result claimants may choose to wait in order to make a better investment.

If under our judicial tradition a court is not supposed to reason by analogy from a statutory doctrine as it does from the rules of the common law, then it can be shown that the specific use of language in the statute supports this same result. The statute provides that for a fact situation like the present one the estate of the insured is entitled to the present value of the instalments remaining payable, this value to be computed as of the date of the "last payment made under any existing award". At the time of judgment in this case it is clear that the present value of the remaining instalments in reality was their full value. The fact that here there was no last payment under an existing award should not mean that you take the present value as of the date of the insured's death like the first Cody case. True, the fact is, there was no last payment under an existing award. But that does not remove the statutory words. Neither does it mean that for this case you can say it is as though the statutory words were not there. While the statute makes its express statement in terms of the positive in a situation where there is a last payment, it also affords the guide for computation in this case.

It is clear that $6.50 representing the amount of premium due for the grace period should be deducted.[4] We reverse with instructions to enter judgment in accordance with this opinion.

Reversed.

56 In United States Court of Appeals for the District of Columbia

No. 7847, April Term, 1941

ELIZABETH KERR, ADMINISTRATRIX OF THE ESTATE OF JOSEPH KELLY KERR, DECEASED, APPELLANT

vs.

THE UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the District of Columbia

Before Honorable D. LAWRENCE GRONER, Chief Justice, and Honorable JUSTIN MILLER and FRED M. VINSON, Associate Justices.

[4] See footnote 3.

Judgment

June 30, 1941

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court, in this cause, be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court with instructions to enter judgment in accordance with the opinion of this Court.

Per Mr. JUSTICE VINSON.

JUNE 30, 1941.

57 [File endorsement omitted.]

58 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Petition for rehearing

Filed July 15, 1941

Comes now the United States of America, by the undersigned attorneys, and respectfully prays that a rehearing be granted in the above-entitled case.

The opinion of the court in this case, rendered on June 30, 1941, indicates that the decision was reached without recognition of the fact that the court's construction of the statute involved (Section 303 of the World War Veterans' Act (38 U. S. C. 514)), is directly opposed to the administrative construction of the same statute, adopted at the time of its enactment more than seventeen years ago, and subsequently adhered to both administratively and judicially until the decision of this court in the present case.

59 The attached letter from the Administrator of Veterans Affairs, dated July 14, 1941, setting forth the original administrative construction and the long-continued uniform practice under it, shows (1) Section 303, as worded in the Act of June 7, 1924, has always been construed to mean that the amount payable to the estate of an insured is the value of the installments payable as of the date the estate became entitled to receive them; (2) that the Veterans Bureau prepared and recommended an amendment to the section (enacted on March 4, 1925) containing language embodied for the sole purpose of avoiding retroactive application of the statute, required by the construction above stated, to cases in

which installment awards to estates of insureds were in course of payment when the Act of June 7, 1924 was enacted;[5] (3) that achievement of this purpose required an amendment by reason of the administrative construction of the statute but not otherwise, and hence the enactment of the amendment as drafted by the Veterans Bureau clearly implies legislative adoption of the administrative construction.

Such a consistent administrative construction by the Veterans Administration has been held to be of "persuasive force." United States v. Madigan, 300 U. S. 500, 505. A construction of this character is "not to be overturned unless clearly wrong, or unless a different construction is plainly required." United States v. Jackson, 280 U. S. 183, 193. Especially is this true where, as here, the administrative agency charged with the duty of administering the statute has drafted amendatory legislation. The Supreme Court has frequently so held. See United States v. Moore, 95 U. S. 760, 763, in which it was said: "The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret." And see also Norwegian Nitrogen Co. v. United States, 288 U. S. 294, 315, wherein it was pointed out that the administrative practice "has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

The opinion of the court in the present case, recognizing that there was no specific Congressional intention to legislate with respect to a case like the present case, and otherwise indicating that the statute was regarded as ambiguous, contains nothing to indicate that the court intended to overturn an established and heretofore unchallenged administrative construction of the statute.

Respectfully submitted.

EDWARD M. CURRAN,
United States Attorney.

JULIUS C. MARTIN,
Directr, Bureau of War Risk Litigation.
WILBUR C. PICKETT,
Special Assistant to the Attorney General.
KEITH L. SEEGMILLER,
Keith L. Seegmiller,
Attorney, Department of Justice.

[5] The amendment provided that in such cases the value of the insurance should "be computed as of the date of last payment under any existing award."

(Copy)

61 OFFICE OF THE ADMINISTRATOR
OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION,
Washington, July 14, 1941.

Honorable CHARLES FAHY,
Acting Solicitor General,
Department of Justice, Washington, D. C.

MY DEAR MR. FAHY: I have studied the opinion of the Court of Appeals for the District of Columbia in the case of Elizabeth Kerr v. United States, decided June 30, 1941, which was transmitted with your letter of July 8, 1941, and have to advise you that the conclusion reached by the Court of Appeals is in direct conflict with the administrative practice uniformly followed by the Veterans Administration and its predecessor, the Veterans Bureau, since June 7, 1924, the date of enactment of the World War Veterans' Act.

The War Risk Insurance Act did not permit the payment of yearly renewable term insurance except in monthly installments, which installments were based upon a sum certain (face value of policy) with interest allowed at a prescribed rate (3½%) over the period of deferred payments. The World War Veterans' Act, June 7, 1924, provided, however, that, effective as of October 6, 1917, when the estate of an insured became entitled to receive the benefits of yearly renewable term insurance* the amount to be paid should be the "present value of the monthly installments thereafter payable."

All cases which have been adjudicated in favor of estates of insureds under Section 303, World War Veterans' Act, have been settled upon the basis of the present value of installments as of the date the insured's estate became entitled to receive payment, except as hereinafter explained. Moreover, no judgment presented to the Veterans Administration for payment has ever embodied any contrary interpretation.

62 Because of an apparent inequity that this uniform application of the provisions of Section 303, as first enacted, would have caused, in a certain class of cases, the Veterans Bureau proposed an amendment which was enacted March 4, 1925. The administrative interpretation—that the clause in Section 303, making that Section retroactive to October 6, 1917, required the computation of the value of unpaid installments as of the date of death of the insured or the date of death of any other person to whom the installments were being paid or might have been paid—was deemed to permit of no exception, even in those cases in which an

*For example, upon the death of an insured with no beneficiary surviving or, as in the Kerr case, upon the date of the death of a surviving beneficiary.

installment award (embracing an allowance of interest upon installments deferred in payment) had been made prior to the passage of the Act of June 7, 1924. Consequently, the amendment of March 4, 1925, providing—

"* * * there shall be paid to the estate of the insured the present value of the monthly installments thereafter payable, *said value to be computed as of the date of last payment made under any existing award;* * * *." [Italics supplied.]

was proposed, as stated by the Veterans Bureau, for the purpose of avoiding deduction from the amount otherwise payable the interest included in installments previously paid pursuant to the authority of then existing law.

In response to your request for my opinion, I have to advise you that I regard the question here involved as one of considerable importance. The number of cases adjudicated within the past seventeen years upon an administrative construction of the applicable statute, at variance with that now adopted by the Court of Appeals, and the magnitude of the administrative tasks which would be presented by a necessity for reviewing such prior adjudications, if the principle were to be applied to all possible cases, indicate the basis for my opinion. And, of course, the cost to the United States would be considerable.

I regret that I am unable to give specific estimates at this time as to the number of cases and the amount of money involved, but I shall direct a study to determine these matters upon receipt of advice from you that you need such information.

Sincerely yours,

(s) FRANK T. HINES,
Frank T. Hines,
Administrator.

63 Service of a copy of the attached petition for rehearing admitted this 15th day of July 1941.

CAMDEN R. MCATEE,
Attorney for Appellant

64 [File endorsement omitted.]

65 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Appellant's objections to appellee's petition for rehearing

Filed July 18, 1941

May It Please the Court:

For appellant, it is necessary to suggest several material objections to the appellee Petition for Rehearing and exhibited letter

of the Honorable Veterans' Administrator to the Honorable Solicitor General, complaining of a conflict between administrative practice existing since June 7, 1924, and the conclusions of this Court in its opinion of June 30, 1941. (All references hereafter are to pages of printed Appellee Brief.)

1. The letter first says, and the petition reiterates, that the conflict is with the administrative practice uniformly followed since enactment of the World War Veterans Act of June 7, 1924. Section 303 of that Act (p. 16), was repealed (p. 29) on March 4, 1925, when Section 303 (p. 16), here in controversy was substituted to establish a new plan for distribution of insurance proceeds. The inference from both the letter and petition is
66 that an administrative practice applicable to the abandoned 1924 Section and rendered obsolete by its repeal and substitution, is the ground of conflict. This inference is strengthened by references in the next two paragraphs of the letter to the abandoned 1924 Section.

2. The second paragraph notes the departure in the World War Veterans Act from previous continuous payment of monthly installments, and the introduction of a new plan for payment of their present value to the estate of insured, if no beneficiary survivide the insured, or if the surviving beneficiary—as happened in this Kerr case, specifically mentioned in the letter—had died before receiving all the installments due and payable.

The paragraph is unfortunately entirely wrong in its statement of the distribution under the new plan prescribed in Section 303 enacted June 7, 1924, into the World War Veterans Act. The error is that the paragraph actually summarizes the later plan obtained in the amended and substituted section enacted on March 4, 1925. Actually the 1924 enactment (p. 10) provided quite differently and imposed upon the Bureau the interval burden of paying subsequent installments to the living persons entitled thereto until the last person died, and provided only for the commutation of the remaining installments into present value for payment to the estate of the insured.

Parenthetically, under this 1924 section as in effect on and before June 28, 1924, at the death of Eugene Kerr, the designated beneficiary, and until March 4, 1925, the remaining installments
67 became payable to appellant, Elizabeth Kerr, mother of insured, as the only surviving person in the permitted class. If so awarded to her, Mrs. Kerr would have received $10,580 in payments beginning in July 1924 and ending with the last installment in October 1939, being the amount judicially awarded to her on April 4, 1940, now affirmed by this Court, and still entirely unpaid to her by appellee.

Parenthetically again, under both the prior law and new 1924 plan, the Bureau had the continuous burdensome duty of distributing the monthly payments among the persons entitled (p. 31), resulting in absurdly small amounts. Consequently, the Bureau conceived (p. 29) and obtained the substituted plan enacted as Section 303 on March 4, 1925, which is the statute involved and construed in this decision. Under this second substituted plan (p. 16), the commuted present value of installments thereafter payable, where there was no designated beneficiary, or where such beneficiary died before receiving installments payable and applicable, was made payable and available to the estate of the insured for distribution to the persons entitled to share in its proper settlement. Thereby, the Bureau relieved itself of the burden of distributing the installments among the persons entitled, and passed the burden to the estate of the insured.

Returning to the letter paragraph, it is thus apparent the paragraph erroneously states the substance of the substituted Section of March 4, 1925, instead of the substance of the abandoned Section 303 of the World War Veterans Act. Whether inadvertent or not, the error emphasizes the confusion about
68 applicable administrative practice inferable from the first paragraph of the letter. When the statement of the applicable law is erroneous and conflicting, alleged resulting conflict of the decision cannot be pinned down to any administrative practice.

3. In its third paragraph, the letter suggests certain exceptional cases. These must have arisen, as contemplated by the writer of the letter, under Section 303 enacted March 4, 1925, summarized in the preceding paragraph as those of the abandoned Section 303 of the World War Veterans Act.

4. The fourth paragraph says the amended or substituted Section 303 was proposed by the Bureau and was enacted March 4, 1925, in such exceptional cases, to avoid deduction of the interest included in previously paid installments from the amount otherwise payable; all notwithstanding that the second paragraph of the letter summarizes Section 303 enacted on June 7, 1924, as containing the provisions of this amended or substituted section. The letter certainly presents its own conflicts.

This reason for proposing the amended and substituted section is new in this case, and, being always available and known to appellee, is no ground for a new trial. The appellee posed, before this Court (p. 7), that the new section was entirely directed against an installment award to the estate of an insured.
69 But before Congress, the amendment was posed in a letter of General Hines as intended to obtain immediate discharge

of obligations and obtain early closing of estates (pp. 30–31), and was so accepted (p. 31) in the Committee report.

The petition for rehearing ignores the new reason for proposal of the substituted Section given by the Administrator, in his letter. The petition says the new section was solely prepared and recommended to avoid retroactive application to installment awards in course of payment on June 7, 1924. Because of the real conflict between the honorable Administrator and appellee attorneys as to the reason for proposing and obtaining the substituted section, the plea in the petition that there has been legislative adoption of an administrative construction lacks all substance.

This case is, as the opinion suggests, an exceptional case. Upon decision by this Court in December 1939, that the insurance contract was in effect at the death of insured on November 8, 1919, the case might have been removed from judicial controversy by administrative adjustment. If so, the beneficiary award of $3,220 would have been made and paid at a date subsequent to the maturity of the insurance contract and after the accrual of all payable monthly installments in October 1939; the consequent award to the estate would have been $10,580, as all the installments payable after death of the beneficiary had matured, and there were no future installments for commutation into a present
70 value. This is the succinct administrative application of Section 303 of March 4, 1925, to its facts, where no monthly installments were ever paid.

Not being so removed from judicial controversy, separate judgment awards in said amounts, in favor, respectively, of the estates of the beneficiary and insured, were entered on April 4, 1940, and certified to the Administration for payment. There was never any objection or contention that the beneficiary award was not payable as so adjudged. Of itself judicially, or by award administratively to effect its payment, it was or became an existing award, and so was sufficient under Section 303 as amended to determine the correctness of the judicial award of $10,580 to the estate of insured. The subsequent Administration payment in April 1941 of the beneficiary award certainly established the propriety of payment of the judicial award of $10,580 to the estate of insured.

This Court, by excellent reasoning, has reached the same conclusion that this simple application of the statutory provisions to the facts so clearly reveals, and has decided the judicial award of $10,580 was and is the correct determination of the amount of the insurance proceeds due and payable to the estate of insured under the same statutory provisions.

4, 5. The fourth and fifth paragraphs of the letter intimate that prior administrative decisions may have to be reexamined

under the decision at considerable cost. If the Veterans
71 Administration had administratively simplified this exceptional case, or had given due effect to the judicial awards, as above suggested, or, after paying the beneficiary award, had paid the award to the estate of insured, the responsibility now complained of might not have been assumed.

Appellant submits these objections clearly establish no sufficient ground for rehearing has been presented, and that the petition should be overruled.

Respectfully,

(s) CAMDEN R. MCATEE
Attorney for Appellant.

Service of a copy of the foregoing Appellant Objections to Appellee Petition for Rehearing admitted this 18th day of July 1941,

(s) KEITH L. SEEGMILLER,
Attorney for Appellee.

72 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order denying petition for rehearing

Aug. 11, 1941

On consideration of appellee's petition for rehearing, filed herein July 15, 1941,

It is ordered that the petition be, and it is hereby, denied.

73 In United States Court of Appeals for the District of Columbia

[File endorsement omitted.]

Designation of record

Filed Oct. 23, 1941

The Clerk will please prepare a certified transcript of record and proceedings in the above entitled cases and include therein the following:

1. Agreed statement of the case on appeal, including:
(a) Judgment pursuant to mandate entered April 5, 1940.
(b) Motion for correction and substitution of judgment in favor of plaintiff, filed June 21, 1940.

(c) Stipulation filed January 9, 1941, nunc pro tunc as of June 21, 1940.
(d) Affidavit of Allen Crenshaw.
(e) Counter-affidavit of Camden R. McAtee.
(f) Plaintiff's motion for an award of interest.
(g) Reference to Veteran Commissioner.
(h) Report of Veteran Commissioner.
(i) Orders appealed from (order correcting judgment, rendered April 4, 1940, and overruling motion for award of interest), entered January 9, 1941.
(j) Notice of appeal filed January 23, 1941.
(k) Order as to appeal undertaking, including appended memorandum.
(l) Points relied upon by the appellant.
74 2. Order of approval of agreed case, filed March 4, 1941.
3. Approval of parties (to the agreed case).
4. Order extending time to file and docket action, filed March 4, 1941.
5. Certificate of Clerk of the District Court.
6. Opinion of the United States Court of Appeals for the District of Columbia and judgment of that court.
7. Petition for rehearing.
8. Objections to petition for rehearing.
9. Order denying petition for rehearing.
10. This designation.
11. Clerk's certificate.

CHARLES FAHY,
Acting Solicitor General.

Service of the above designation of record accepted October 20, 1941.

CAMDEN R. MCATEE,
Counsel for appellant.

75 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1941



Supreme Court of the United States

Order allowing certiorari

Filed December 15, 1941

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1942